No. 93-1631

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

LLOYD BENTSEN, SECRETARY OF THE TREASURY,
Petitioner,
v.
COORS BREWING COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMICUS CURIAE THE BEER INSTITUTE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

STATUTES AND CONSTITUTIONAL PROVISIONS

MISCELLANEOUS

TABLE OF AUTHORITIES—Continued

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STATEMENT OF INTEREST[1]

The Beer Institute[2] is a national trade association representing over 250 members of the malt beverage industry. Beer Institute members produce 93% of the beer consumed in the United States. Brewers use the output of millions of acres of agricultural land to produce beverages enjoyed by over 80 million American consumers. They process millions of tons of agricultural commodi-

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[1] Written consent of both parties to the filing of this brief has been filed with the Clerk of the Court as required by Supreme Court Rule 37.

[2] Respondent Coors Brewing Company is a member of the Beer Institute, but it did not take part in either the preparation or funding of this brief.

ties and manufacture a wide variety of other items. In several major urban areas, brewers are among the handful of remaining employers offering highly skilled manufacturing jobs. The industry employs over 2.6 million Americans from farms and granaries to breweries, packaging companies, distributors, and retailers, and pays billions of dollars in industry-specific taxes annually.

The brewing industry has a longstanding record of voluntary compliance and cooperation with federal and state government agencies. Far above and beyond their responsibility to adhere to statutes and regulations, brewers, individually and through the Beer Institute, have developed and financed numerous sustained, nationwide, educational initiatives to prevent alcohol abuse and underage drinking.[3] Brewers advocate strict enforcement of laws prohibiting alcohol beverage purchases by minors. Industry members have developed and implemented many of the most successful national campaigns to keep intoxicated drivers off the road and to promote responsible consumer behavior.

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[3] Well known multimedia programs sponsored and financed by industry members include the following: "Know When to Say When" (Anheuser-Busch Companies); "Think When You Drink" and "Take the Lead—Become a Designated Driver" (Miller Brewing Company); "Drink Safely" and "Alcohol, Drugs, and You" (Coors Brewing Company); "Family Talk About Drinking" and "Let's Stop Underage Drinking Before It Starts" (Anheuser-Busch Companies). Further, the Beer Institute and the National Beer Wholesalers Association sponsor a nationwide distribution of "We ID" reference cards, available in English, Spanish, and Korean, to assist retailers in detecting false identification. Responsible server guides for bartenders, waiters, waitresses and a separate guide for home entertainment are produced and distributed nationally by brewers. Brewers have sponsored anti-alcohol abuse initiatives with numerous other organizations including the American Medical Association, the National Collegiate Athletic Association, the Alcohol Beverage Medical Research Foundation, and the National Commission Against Drunk Driving.

The Beer Institute speaks for its members and their employees, hard-working men and women in 50 states and the District of Columbia, who are the real strength of the industry. They share and value the First Amendment freedoms of all Americans. The members of the Beer Institute respectfully provide herein an industry-wide perspective in support of the Respondent's position on matters germane to this Court's decision.

Petitioner and his supporting amici paint a distorted picture of this industry and would have this Court restrict the commercial speech rights of its companies and customers simply because of the products involved. Not able to meet the Court's well-developed test for evaluating restrictions on commercial speech established in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), Petitioner seeks to create a separate, lower tier of First Amendment protection for commercial speech concerning alcohol beverages.

If accepted, such minimal protection would severely and adversely impact the First Amendment rights of the Beer Institute, its members, and indeed, all producers and consumers of alcohol beverages or any other lawful product that the Government—or some vocal private interest group—may target as "socially harmful." The Beer Institute accordingly urges the Court to reaffirm the principle that First Amendment rights cannot be taken away unless the government has met its burden of proving to the satisfaction of reviewing courts that its restrictions are constitutionally permissible under *Central Hudson*.

SUMMARY OF ARGUMENT

For nearly two decades, this Court has repeatedly affirmed the value of, and First Amendment protection afforded, commercial speech. Petitioner asks this Court to ignore this established body of law and reduce the Government's constitutional burden to justify its labeling ban, either by diluting the Court's *Central Hudson* test in the

context of speech concerning alcohol, or by avoiding that constitutional test altogether through "added presumptions" invoked against free speech.

Petitioner's attempt to eviscerate constitutional protection for truthful, non-misleading commercial speech concerning alcohol beverages is not based in law or in fact. This Court long ago established—and continues to reaffirm—that the government bears the burden of proving that it has a real and substantial purpose for its restrictions on commercial speech, that the restrictions directly and materially advance that purpose, and that a reasonable fit exists between the government's ends and its means. The Court has also stressed the role of the judiciary to critically review the government's showing to ensure it carries that constitutional burden.

Petitioner cannot bolster his showing under *Central Hudson* by inventing a fictional federalism interest for the Government's restrictions on speech. Nor can Petitioner avoid producing evidence to prove the statute directly and materially advances the Government's alleged interest in curbing strength wars. Thus, Petitioner's attempt to rely on so-called "common sense" presumptions or deference to Congressional findings must fail.

Worse than attempting to reduce his substantial burdens under *Central Hudson,* Petitioner attempts to escape them altogether by advancing an unsupportable theory that would apply "added presumptions" of constitutionality to restrictions on speech concerning alcohol beverages. Petitioner asks this Court to create an unprecedented lower tier of speech about so-called "socially harmful" products, and arbitrarily assigns beer to that sub-category. Because almost any product can be accused of being "socially harmful," Petitioner's test would create a new good product/bad product dichotomy to be defined at the Government's whim. This scheme is not supported by previous cases, logic or fact, and threatens to undermine First Amendment protection for *all* commercial speech.

Petitioner—a federal officer defending a federal statute —also argues that this case implicates States' rights under the Twenty-first Amendment. Put bluntly, this is not a Twenty-first Amendment case. Petitioner's argument flies in the face of the plain meaning of that constitutional provision and is entirely inconsistent with this Court's Twenty-first Amendment jurisprudence.

Petitioner, in short, offers neither authority nor logic in support of his arguments that speech concerning alcohol beverages is entitled to lesser First Amendment protection than commercial speech on other subjects. The Court should reject Petitioner's arguments and continue to apply the *Central Hudson* test to evaluate restrictions on truthful, non-misleading commercial speech, regardless of the product or activity it concerns.

ARGUMENT

I. THE FIRST AMENDMENT AFFORDS SUBSTANTIAL PROTECTION TO COMMERCIAL SPEECH.

As recently as this year in *Ibanez v. Florida Dept. of Business and Professional Regulation*, 114 S. Ct. 2084 (1994), this Court reiterated the high value and significance it has accorded commercial speech since specifically extending First Amendment protection to it in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). "Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n. of N.Y.*, 447 U.S. 557, 561-62 (1980). Commercial speech thus joins political speech in the First Amendment's free marketplace of ideas. Protection of commercial speech provides the public with unfettered and truthful information, affording the most effective foundation for informed decisionmaking in our open society by citizens who will "perceive their own best interests if only they are well enough informed." *Id.* at 562 (quoting *Virginia Pharmacy*, 425 U.S. at 770); *see City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1512 (1993) ("In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking.").

Accordingly, the Court has provided substantial First Amendment protection for truthful commercial speech about lawful products, and its "decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626,

646 (1985); *accord Ibanez*, 114 S. Ct. at 2039; *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 478 (1988). Government regulation of commercial speech thus is subject to searching evaluation by the courts, and the government bears substantial factual burdens to justify limits—and particularly bans—imposed on such speech. *E.g., Ibanez*, 114 S. Ct. 2084; *Edenfield v. Fanc*, 113 S. Ct. 1792 (1993).

This Court has emphasized the vital role of the judiciary in holding government to its First Amendment burden of proof in defending commercial speech regulations. In fact, the importance of that role is a central tenet of the Court's commercial speech cases. Under the *Central Hudson* test, as it has been elaborated in such recent cases as *Ibanez, Edenfield*, and *Discovery Network*, Petitioner must not only show that the Government's purpose in enacting a restriction on commercial speech is both real and substantial, but prove that the restriction directly and materially advances that purpose and is no more extensive than necessary to achieve it, considering the availability of alternative regulations with less impact on speech.

In short, Petitioner bears a heavy burden to prove that Section 205(e)(2) of the Federal Alcohol Administration Act ("FAAA"), 27 U.S.C. § 205(e)(2), is a permissible restriction on commercial speech. The district court and the Tenth Circuit correctly held Petitioner to that burden of proof, and this Court should do the same.

II. THIS COURT SHOULD REJECT PETITIONER'S ATTEMPT TO BOLSTER THE GOVERNMENTAL INTEREST BEHIND SECTION 205(e)(2) WITH A NEWLY-DISCOVERED FEDERALISM CONCERN.

This Court should reaffirm that Petitioner bears the burden of producing evidence to prove that this prohibition on truthful alcohol-content labeling is supported by a current substantial governmental interest, and that

the statute directly advances that interest to a material degree. Only if the Court is convinced that Petitioner has carried this burden can the statute's restriction on speech pass constitutional muster.

Petitioner seeks to bolster his showing of a substantial governmental interest by introducing to this Court, for the first time in this action, a new interest underlying the Government's commercial speech restriction. Before the Tenth Circuit, Petitioner "assert[ed] that the prohibition on speech contained in § 205(e)(2) was imposed to prevent strength wars among malt beverage manufacturers." *Adolph Coors Co. v. Bentsen*, 2 F.3d 355, 358 (10th Cir. 1993); cf. Petitioner's Brief at 20 (now referring to the curbing of strength wars as a "central goal" of the statute). In a transparent attempt to take advantage of this Court's decision in *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696 (1993), Petitioner suddenly asserts a "federal" purpose for the statute of "respect[ing] and facilitat[ing] . . . state regulation of alcohol pursuant to the Twenty-first Amendment." Petitioner's Brief at 20. No such interest underlies Section 205(e)(2).

Petitioner's recent discovery of a federalism interest in Section 205 highlights the importance of this Court's requirement that reviewing courts "identify with care the interests the State itself asserts" and not blindly accept the Government's assertions "if it appears that the stated interests are not the actual interests served by the restriction." *Edenfield v. Fane*, 113 S. Ct. 1792, 1798 (1993). The Government bears the burden of proving that the new-found federalism concern "'it recites [is] real.'" *Ibanez*, 114 S. Ct. at 2089 (quoting *Edenfield*, 113 S. Ct. at 1800).

A careful reading of Section 205(e), which applies to labeling, and its companion, Section 205(f), which applies to advertising, debunks Petitioner's superficial federalism claim. The penultimate paragraph of Section 205(f) makes it clear that neither subsection (e) nor subsection (f) applies to malt beverages unless independent State

regulation already exists concerning their labeling or advertising. The penultimate paragraph of Section 205(f) provides:

> In the case of malt beverages, the provisions of this subsection *and subsection (e)* of this section shall apply to the labeling of malt beverages sold or shipped or delivered for shipment or otherwise introduced into or received in any State from any place outside thereof, or the advertising of malt beverages intended to be sold or shipped or delivered for shipment or otherwise introduced into or received in any State from anyplace outside thereof, only to the extent that the law of such State imposes similar requirements with respect to the labeling or advertising, as the case may be of malt beverages not sold or shipped or delivered for shipment or otherwise introduced into or received in such State from any place outside thereof. (emphasis added)

Section 205(e) applies only to malt beverages that move "in interstate or foreign commerce," *see* 27 U.S.C. § 205(e), and thus does not affect purely intrastate brewers. If a State has enacted a labeling restriction to trigger Section 205(e), however, a duplicative federal restriction would have no practical effect. The State statute would already prohibit an out-of-state brewer from delivering malt beverages into the State that are not in compliance with State law. Section 205(e) thus does nothing to add to or advance any State policy and is not—nor was it intended to be—in the service of any federalism interest.[4]

The legislative history of the Section reveals that Congress worded the statute not as an "accommodation" of

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[4] Even if, as Petitioner asserts and despite its clear language to the contrary, the penultimate paragraph of Section 205(f) were subjected to a tortured interpretation in order to avoid its application to Section 205(e), Petitioner's federalism argument would be no stronger. In that case, the statute would impose federal requirements in States that have no such requirements—hardly a result that seeks to accommodate State interests.

the States or a recognition of the Twenty-first Amendment, but to avoid (1) overstepping the limits of its power under the Commerce Clause as it was then understood, and (2) putting interstate brewers at a competitive disadvantage with respect to intrastate brewers.[5]

Section 205 is markedly dissimilar to the statute upheld in *Edge Broadcasting*. That federal statute originally banned all broadcast advertising of lotteries, but with the advent of State-run lotteries, it was later amended to permit advertising of State-run lotteries by broadcasters located in lottery States. "This exemption was enacted 'to accommodate the operation of legally authorized State-run lotteries consistent with continued Federal protection to the policies of non-lottery States.' " 113 S. Ct. at 2701 (quoting S. Rep. No. 93-1404 at 2 (1974)). In contrast to the self-executing federal ban examined in *Edge*, Section 205(e)(2)'s labeling requirement is triggered only

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[5] The FAAA was debated and passed in the wake of *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), which made it clear that under the Commerce Clause the Congress had no power to regulate intrastate commerce. Because the great majority of the brewery industry at the time was intrastate, Congress knew that the federal regulation of malt beverages under Section 205 would apply only to the small percentage of malt beverages that moved in interstate commerce. *See, e.g.*, 79 Cong. Rec. 14,568-69, 14, 571 (1935) (Statement of Rep. Fuller; Statement of Rep. Doughton). It was strenuously argued that the proposed bill was unfair because the interstate brewer "will be forced to comply with the regulations of the Federal Alcohol Administration and the fair-trade practices set forth in this bill, while the brewer engaged in the sale of beer in intrastate commerce will, in the conduct of his business, be beyond Federal regulation or control." Federal Alcohol Control Act: Hearings on H.R. 8870 Before the Comm. on Finance, 74th Cong., 1st Sess. 114 (1935) (Statement of M.J. Donnelly representing brewers shipping in interstate commerce). Congress' use of state law as a benchmark in the final bill that included Section 205 thus had nothing to do with accommodating State interests—it was a compromise that avoided giving intrastate brewers an unfair advantage over interstate brewers.

by a similar State law requirement. As already noted, Section 205(e)(2) neither facilitates nor advances any State interest and, unlike the statute in *Edge Broadcasting*, is not designed to accommodate States' conflicting policies.

Significantly, Petitioner does not argue that he has proved that Section 205(e)(2) directly and materially advances the Government's newly posited interest in facilitating State authority under the Twenty-first Amendment—or proved that a reasonable fit exists between the statute and this interest. Petitioner does suggest that Section 205(e)(2) "gives effect" to a State's decision to limit alcohol content "by making it less likely that a citizen from [one] State will travel to another state to purchase beer with a higher alcohol content." Petitioner's Brief at 22-23. As an initial matter, Petitioner has it backwards. It is State law that "gives effect" to Section 205(e), not vice versa; as discussed above, in the absence of State law, Section 205(e) has no independent substance with respect to malt beverages. Moreover, no record evidence supports Petitioner's theory that, if citizens receive accurate information on beer labels concerning alcohol content, they will travel from State to State in search of the strongest beer.

The Government thus has utterly failed to carry its burden to prove that Section 205(e)(2)'s restrictions on commercial speech satisfy either the third or fourth *Central Hudson* prong vis-a-vis its purported federalism interest. In the absence of such proof, the Government's asserted federalism interest should be seen and rejected for what it is: a blatant eleventh hour attempt to bring Section 205(e)(2) under *Edge Broadcasting*'s federalism umbrella, rather than risk relying on Petitioner's previously asserted justification of curbing strength wars among brewers.

III. PETITIONER'S RELIANCE ON "COMMON SENSE" PRESUMPTIONS AND DEFERENCE TO CONGRESSIONAL FINDINGS FAILS TO PROVE THE STATUTE DIRECTLY AND MATERIALLY ADVANCES THE GOVERNMENT'S ALLEGED INTEREST IN CURBING STRENGTH WARS.

When Petitioner actually addresses his burden to prove that Section 205(e) directly and materially advances the Government's interest in curbing strength wars, he attempts incorrectly to satisfy that burden by relying on presumptions and legislative history rather than on evidence. The third *Central Hudson* prong requires this Court to find that Petitioner has proven both that Section 205(e)(2) "directly advance[s] the state interest involved," 477 U.S. at 564, and that the statutory restriction will alleviate real harms "to a material degree." *Edenfield*, 113 S. Ct. at 1800. "Without this requirement, a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." *Id.* Petitioner improperly seeks to avoid carrying this burden by conjuring up so-called "common sense" presumptions and calling for deference to Congressional findings. Neither presumptions nor deference can satisfy the Government's burden of proof.

A. Petitioner Cannot Rely on Presumptions to Satisfy His Burden of Proof.

Rather than rely on evidence, Petitioner would have this Court simply presume that Section 205(e)(2)'s commercial speech restriction directly advances the Government's interest in a material way. Petitioner first advances the purportedly "common sense" presumption that restrictions on product advertising decrease demand for that product. Petitioner then asks the Court to make a leap of faith that "a restriction on the advertising of a product characteristic will decrease the extent to which consumers select the product on the basis of that characteristic." Petitioner's Brief at 27. But Petitioner would have the Court believe that a two foot leap will land it

safely across a ten foot ditch. Petitioner's factual propositions cannot be presumed. They must be proven before they can be used to satisfy his obligation to demonstrate that Section 205(e)(2) directly advances the Government's interest in curbing strength wars.

Even assuming the validity of Petitioner's argument that labeling is equivalent to advertising, as an initial matter Petitioner offers no basis on which to presume a causal connection between advertising and demand for alcohol beverages.[6] In fact, the Government itself through the staff of the Federal Trade Commission reviewed the literature regarding the quantitative effect of alcohol beverage advertising on consumption and concluded that there is "no reliable basis to conclude that alcohol advertising significantly affects consumption." RECOMMENDATIONS OF THE STAFF OF THE FEDERAL TRADE COMM'N, OMNIBUS PETITION FOR REGULATION OF UNFAIR AND DECEPTIVE ALCOHOL BEVERAGE ADVERTISING AND MARKETING PRACTICES, Docket No. 209-46 at 2 (March 1985). Other studies and recent reviews of the literature have reached the same conclusion.[7] That some courts

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[6] The so-called "common sense" presumption appears to be based on the notion that advertising *must* increase overall consumption of a product or companies would not spend money on advertising. This notion, however, is based on a fundamental misunderstanding of how advertising works in a mature market, *i.e.*, a market for an established product, such as beer. The prevailing view is that in a mature market, the purpose and effect of a particular company's advertising is to encourage consumers to choose that company's brand, not to increase general consumption of that type of product. M. J. WATERSON, ADVERTISING, BRANDS AND MARKETS 19 (Advertising Ass'n Monograph, 2d ed. 1985). The impact of a restriction on advertising of a given product will vary depending on the market for the product. In any commercial speech analysis, therefore, the causal connection between the restriction and the impact on the market should be proven through evidence—not conjecture. Here the lower courts found that the evidence presented in this case did not support the government's conjecture.

[7] *See, e.g.*, J. C. FISHER, ADVERTISING, ALCOHOL CONSUMPTION, AND ABUSE: A WORLDWIDE SURVEY 142 (1993) ("no experimental evidence exists" that advertising affects consumption); Reginald G. Smart,

have assumed a "link" between advertising and consumption in different factual settings is a far cry from proof of a causal connection between advertising and alcohol beverage consumption, which is required under *Central Hudson*. In this case, the Court cannot simply presume such a connection on the record before it. *Cf. Ibanez*, 114 S. Ct. at 2090 ("If the 'protections afforded commercial speech are to retain their force,' we cannot allow rote invocation of the words 'potentially misleading' to supplant" the government's burden of proof) (quoting *Zauderer*, 471 U.S. at 648-49) (citation omitted).

Nor should the Court accept the Government's failure to produce facts to support its restriction in favor of what amounts to an increasingly hypothetical series of presumptions inherent in Petitioner's "common sense" argument: (1) advertising increases consumption; and (2) labeling is the same as advertising; therefore, (3) labeling increases consumption; therefore, (4) placing product characteristics on labels increases consumption; therefore, (5) the placement of selected product characteristics on labels by some producers will result in their competitors' enhancing those characteristics of their own product; therefore, (6) the competitors will then label their product to promote those enhanced characteristics; therefore, (7) the original producers will respond in kind. Such entirely factual propositions are subject to a vast array of variables—including the nature of the product, the marketplace, the product's characteristics, the competi-

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Does Alcohol Advertising Affect Overall Consumption? A Review of Empirical Studies, 49 J. STUDIES ON ALCOHOL 314, 316 (1988) ("The evidence indicates little impact of alcohol advertising on alcohol sales or drinking"); George R. Franke & Gary B. Wilcox, *Alcoholic Beverage Advertising and Consumption in the United States, 1964-1984*, 16 J. ADVERTISING 22, 28 (1987) (advertising does not substantially affect total alcohol consumption); *see also* Karen L. Sterchi, *Restraints on Alcoholic Beverage Advertising: A Constitutional Analysis*, 60 NOTRE DAME L. REV. 779 (1985) (and studies cited therein) ("Alcohol use is affected by a complex interaction of factors such as cultural, family and peer group influences").

tors, consumer tastes, the actual effect on sales, etc.—and accordingly those propositions must be proven by evidence, not simply presumed according to asserted notions of "common sense" that may or may not be accurate in a particular factual context. *See Hornell Brewing Co. v. Brady*, 819 F. Supp. 1227, 1237 (E.D.N.Y. 1993) (refusing to make a similar "leap of faith and logic"). Absent requiring such evidence, the protection afforded commercial speech would drown in a sea of presumptions and be stripped of any real meaning.

B. The Court Cannot Simply Defer to Alleged Legislative Findings to Conclude That a Restriction on Commercial Speech Directly and Materially Advances a Current Governmental Interest.

Petitioner also seeks to avoid producing sufficient evidence to satisfy the third *Central Hudson* prong by asking the Court to defer to alleged Congressional fact-finding dating to 1935, citing this Court's reecnt decision in *Turner Broadcasting Sys. v. FCC*, 114 S. Ct. 2445 (1994). Even if Congress made the factual findings Petitioner assumes,[8] his argument demonstrates a fundamental misunderstanding of the significance of deference in evaluating governmental restrictions on commercial speech.

Turner Broadcasting did not involve commercial speech but was a challenge to "must-carry" regulations that require cable television operators to transmit on their cable systems the over-the-air signals of local commercial and public broadcast stations. Far from deferring to Congress' "unsually detailed statutory findings," *id.* at 2461 (plurality op. of Kennedy, J.), the Court reversed the

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[8] There is good reason to conclude that Congress made no findings concerning "strength wars" in any context except misleading or deceptive statements of actual alcohol content. *Hearings Before the Federal Alcohol Control Administration With Reference to Proposed Regulations Relative to the Labeling of Products of the Brewing Industry* (cover of draft regulations) (Nov. 1, 1934). Congress' concern was *deception* not alcohol content. The case before the Court concerns a ban on *truthful* statements of alcohol content.

grant of summary judgment in favor of the government and remanded the case to the three-judge district court panel for additional *judicial* findings of fact:

> [U]nless we know the extent to which the must-carry provisions *in fact* interfere with protected speech, we cannot say whether they suppress "substantially more speech than . . . necessary" to ensure the viability of broadcast television. Finally, the record fails to provide any *judicial findings* concerning the availability and efficacy of "constitutionally acceptable less restrictive means" of achieving the Government's asserted interests.

Id. at 2472 (plurality op. of Kennedy, J.) (emphasis added) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989), and *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129 (1989)).

The Court's recent commercial speech cases echo this requirement that the Government must establish by judicial fact-finding—not deference to legislative determination—that the challenged regulation directly advances the Government's interest in a material way. *See, e.g., Ibanez*, 114 S. Ct. 2084; *Edenfield*, 113 S. Ct. 1792. Significantly, the plurality in *Turner Broadcasting* cites *Edenfield* for the proposition that in defending a regulation on speech designed "to redress past harms or prevent anticipated harms," the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broadcasting*, 114 S. Ct. at 2470 (plurality op. of Kennedy, J.). Even if harms were asserted in 1935, they may or may not exist in 1994. Regardless, the Government at all times bears the burden to prove that they currently exist or likely will develop.

Petitioner raises the specter of periodic constitutional challenges to the FAAA according to the cyclical whims of consumers' tastes. But this tactic falls far short of meeting Petitioner's burden of proving that strength wars implicate a substantial governmental interest and that Section 205(e)(2) directly alleviates that harm in a ma-

terial way. Historical legislative findings, if any, may provide some evidence of current or anticipated harm, but the Court must still determine on the evidence before it whether the existence or threat of such harm is real, *see Ibanez*, 114 S. Ct. at 2089, not simply defer to the legislative findings.[9]

IV. COMMERCIAL SPEECH CONCERNING ALCOHOL BEVERAGES IS NOT SUBJECT TO REDUCED CONSTITUTIONAL SCRUTINY UNDER *CENTRAL HUDSON*.

Not content to advocate diluting the four-part *Central Hudson* test, Petitioner has invented "added presumptions" of constitutionality that allegedly apply under *Central Hudson* to alcohol beverage labeling because the speech involves an activity defined by a government censor as "socially harmful," and because governmental restrictions on such speech purportedly were enacted to enforce the Twenty-first Amendment. The Court has never recog-

[9] Perhaps because the Tenth Circuit did not address *Central Hudson*'s fourth prong, the Government apparently does not ask this Court to reduce its burden to prove a reasonable fit between its means and asserted ends. *See, e.g., City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1509-10 (1993) (elaborating on requisite burden of proof). The Government, however, disingenuously maintains that Section 205 "prohibits only the use of [alcohol content] information in labeling and other forms of advertising, and thus allows brewers or the media to supply alcohol-content information outside the advertising context." Petitioner's Brief at 34. Presumably, a brewer may still buttonhole a person on the street to discuss alcohol content in malt beverages, but such an alternative avenue of expression is no alternative at all. *See City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2046 (1994) (finding no "adequate substitutes exist for the important medium of speech that Ladue has closed off"). Given the ban on advertising in Section 205(f), Section 205(e)(2) effectively prohibits brewers from discussing alcohol content of malt beverages in their commercial speech unless a State specifically provides otherwise. To uphold Section 205(e)(2) under *Central Hudson*'s fourth prong, therefore, the Court must find that a federal ban on commercial speech concerning the alcohol content of malt beverages reasonably fits the Government's asserted interest in curbing strength wars.

nized any such deviations from First Amendment protection of commercial speech and should flatly reject imposing any such "added presumptions."

A. This Court Has Not Sanctioned a Lower Level of Constitutional Scrutiny for Commercial Speech Concerning Activities Alleged to Be "Socially Harmful."

Petitioner creates out of whole cloth the notion that the Court's commercial speech standards apply less rigorously in the context of speech concerning so-called "socially harmful" activities. Petitioner selectively cites cases upholding commercial speech restrictions to support his theory but conveniently omits cases in which courts have struck down restrictions on speech concerning activity that a government has pronounced "socially harmful" without diminishing the applicable constitutional standards. *See, e.g., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984) (alcohol beverage advertising); *Hornell Brewing*, 819 F. Supp. 1227 (alcohol beverage labeling); *Michigan Beer & Wine Wholesalers Ass'n v. Attorney General*, 142 Mich. App. 294, 370 N.W.2d 328 (Mich. Ct. App. 1985) (alcohol beverage advertising); *see generally Craig v. Boren*, 429 U.S. 190 (1976) (invalidating state alcohol beverage regulation on equal protection grounds).

The consistent theme of this Court's jurisprudence is that *all* restrictions on commercial speech are evaluated according to the standards established in *Central Hudson* —not that protection for commercial speech varies according to the legal product or activity that speech concerns. *See, e.g., Edge Broadcasting*, 113 S. Ct. 2703 (refusing to address government's argument that speech concerning "vice" activities should not be evaluated under *Central Hudson*). Once again, as it did in its brief to this Court in *Edge Broadcasting*, the Government mischaracterizes this Court's decision in *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), in an attempt to support its "socially harmful" proposition. The *Posadas* Court, however, was careful to evaluate the commercial speech ban imposed by

Puerto Rico under the *Central Hudson* test. *Id.* at 339-44. Only after concluding that the challenged restriction was constitutionally permissible under *Central Hudson* did the Court in dicta refer to any special consideration accorded to speech based on the underlying activity it concerns. Even then, the Court's discussion was in response to an argument that a legislature cannot seek to reduce demand of a legal product through restrictions on advertising. *Id.* at 346-47. The Court rejected this claim to *increased* commercial speech protection but nowhere suggested that the nature of the product justified *decreased* First Amendment scrutiny. Neither the Court's decision in *Posadas*, nor any of its subsequent decisions, provide any support for the creation of a lower level of First Amendment protection for speech concerning allegedly "socially harmful" activities.

Nor is such a lower level of protection even remotely viable without destroying the commercial speech doctrine and without granting immense power to Government to classify speech in an arbitrary manner. Rarely does a day go by without a news story describing the allegedly harmful effects of producing or consuming the products and activities that are an integral part of modern life. Virtually everything from the food we eat, to the clothes we wear, to the vast array of products we use every day, results from, or potentially leads to, activity that is "socially harmful" in someone's view. If commercial speech concerning such activities could be regulated without reference to established First Amendment principles, virtually all commercial speech would be left unprotected.

For example, motor vehicles have traditionally been considered to pose risks of a variety of social harms, including death, injury, property damage, traffic congestion, and air pollution. The driving and manufacturing of automobiles have long been subject to particularly close regulation by the States, under their police power, and the federal government, under the Commerce Clause, in areas such as licensing, traffic, safety, and emission statutes. These governments have broad authority to regulate, and

perhaps even to ban, automobiles. Acceptance of Petitioner's argument would result in a presumption of validity applicable to any restriction or prohibition on commercial speech that concerns motor vehicles and is posited on social harm, from advertising sales of the cars themselves and related products such as gasoline, tires, and repair to promoting related services and activities like motels, rental car agencies, parking garages, and car washes.

Petitioner, in his attempt to gain the power to ban speech concerning "socially harmful" products, never addresses the implicit and frightening question of who should decide what is a "socially harmful" product and on what basis that decision, and decisions concerning related speech, should be made. In startling contrast to the arguments he advances in this Court, nothing in the record suggests that the Secretary, or the Bureau of Alcohol, Tobacco and Firearms ("BATF"), has concluded that alcohol is a "bad product" or that alcohol consumption is a "socially harmful" activity. In fact, the National Institute on Alcohol Abuse and Alcoholism of the U.S. Department of Health and Human Services acknowledged in a letter to the Director of BATF that "there is a body of generally accepted evidence suggesting that moderate drinkers are at a lower risk for coronary artery disease." [10] Yet, the Government asks this Court to free it from First Amendment constraints and allow it to ban commercial speech merely because it now argues that the underlying product or activity is "socially harmful," with no proof in the record to support such a claim.[11]

[10] Department of Health and Human Services (National Institute on Alcohol Abuse and Alcoholism's Office of Scientific Affairs), Scientific Review of Letters Concerning the Health Warning Statement on Labels of Alcoholic Beverages Referred to NIAAA by the Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury 15 (1992).

[11] The Government thus apparently believes that it knows best what products should be allowed to be advertised, and even what manner of advertising is permissible for communicating with consumers. The First Amendment protects against such ideological censorship, instead trusting the speaker and the audience to "assess the value of the information presented." *Edenfield*, 113 S. Ct. at 1798.

In the wake of such sweeping governmental authority, what other forms of commercial speech would still receive full First Amendment protection? With the exception of commercial speech concerning products or activities specifically protected by the Constitution, *see, e.g., Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (contraceptive products); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (abortion clinic), there would be virtually no protected commercial speech if the Court accepts Petitioner's boundless "socially harmful" standard. Using alcohol beverages as its current whipping boy, the Government is asking for nothing less than abandonment of this Court's protection of commercial speech under the First Amendment—a request that the Court should firmly deny.

B. Federal Restrictions Are Not Entitled to Presumptive Validity Under the Twenty-First Amendment.

Petitioner also claims that the Twenty-first Amendment imposes an "added presumption" of constitutional validity for federal restrictions enacted ostensibly in support of State authority to regulate alcohol beverages. In addition to defying all logic, Petitioner's position is based on a fundamental misunderstanding of the nature and scope of the Twenty-first Amendment.

At the outset, Petitioner strains credulity to the breaking point by even suggesting that a constitutional provision ceding particular authority to the States entitles federal government action to a greater presumption of validity. The Twenty-first Amendment "reserves to the States power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause." *Capital Cities*, 467 U.S. at 712. While Congress retains Commerce Clause authority to regulate commerce in alcohol beverages, *id.* at 713, the Amendment provides no addi-

tional power to the federal government, nor has it been interpreted to increase Congressional authority.

Petitioner nevertheless maintains that any added presumption applicable to State-imposed restrictions on alcohol beverages should be afforded to related regulations promulgated by the Federal government. The Government cites no authority for this novel theory and fails to justify its position by advancing the convoluted argument that without such a standard, a State law might be upheld while a related federal law would be struck down. This argument turns a blind eye to the very nature of our federal system, which limits federal authority in favor of action by the States (and vice versa). *See, e.g.*, U.S. Const. amend. X. Our constitutional jurisprudence is replete with instances in which a State statute may be upheld while a similar federal law would be found unconstitutional. For example, most of the provisions in the Bill of Rights are applicable to the States by way of the Fourteenth Amendment, but some, like part of the Sixth and the Seventh Amendments, are not. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 11-2 (2d ed. 1988) (and cases cited therein). A State statute modifying its citizens' right to a jury trial, therefore, may withstand constitutional scrutiny while the same action taken by Congress would be unconstitutional. *See, e.g., Apodaca v. Oregon*, 406 U.S. 404 (1972) and *Johnson v. Louisiana*, 406 U.S. 356 (1972) (requiring unanimous jury verdict in federal criminal trials but allowing non-unanimous verdict in state trials).

Nor would a Congressional intent to support States' efforts to regulate alcohol beverages bring federal regulations within the purview of the Twenty-first Amendment. That Amendment provides that "transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, *in violation of the laws thereof*, is hereby prohibited." U.S. CONST. amend. XXI, § 2 (emphasis added). The Amendment's plain language addresses violation only of *State* law, while Congressional authority to regulate alcohol derives from the Commerce

Clause in Article I, section 8—an entirely separate constitutional provision. The validity of a federal law restricting commercial speech about alcohol beverages, therefore, should be determined by reference to the constitutional provision authorizing Congress to enact such a restriction —and by the First Amendment—not by the Amendment that sanctions the power of the States to regulate the sale of alcohol beverages.

Even if the Twenty-first Amendment were to apply in some fashion to federal as well as state alcohol regulations, the protection afforded speech under the First Amendment would be just as strong. The Twenty-first Amendment "primarily created an exception to the normal operation of the Commerce Clause," not a separate framework for analyzing restrictions on individual rights guaranteed by other constitutional provisions:

> Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful. As one commentator has remarked: "Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned."

Craig v. Boren, 429 U.S. 190, 206 (1976) (quoting PAUL BREST, PROCESSES OF CONSTITUTIONAL DECISION-MAKING, CASES AND MATERIALS 258 (1975)).

The Court has consistently concluded that the Twenty-first Amendment does not alter the standards for assessing the constitutional validity of government action infringing individual rights. *See id.* at 207 ("the Court has never recognized sufficient 'strength' in the [Twenty-first] Amendment to defeat an otherwise established claim of invidious discrimination in violation of the Equal Protection Clause"); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (same for Due Process Clause). The Court has reached the same conclusion in the context of the First

Amendment's Establishment Clause. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982).

The Court addressed the nature of a State's exercise of Twenty-first Amendment authority through restrictions on commercial speech in *Capital Cities*, 467 U.S. 691. In that case, Oklahoma required local cable television systems to delete advertisements for certain alcohol beverages when retransmitting out-of-state signals within Oklahoma. The Court held that Oklahoma's interest in discouraging alcohol consumption by restricting some (but not all) advertising was "modest," and "engaged[d] only indirectly the central power reserved by § 2 of the Twenty-first Amendment—that of exercising 'control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.'" *Id.* at 715 (quoting *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)). The Court found that such "indirect" exercise of Twenty-first Amendment authority may be outweighed by a federal statute—advancing the "federal objective of ensuring widespread availability of diverse cable [television] services"—much less the Constitution. *Id.* at 715-16; *see generally California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (state's power to regulate liquor under the Twenty-first Amendment is subject to federal antitrust laws); *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964) (state cannot tax liquor in violation of Export-Import Clause).

The Government completely ignores *Capital Cities* and relies on *California v. LaRue*, 409 U.S. 109 (1972), and related cases in support of its position. *See* Petitioner's Brief at 43 n.32. The Court in *LaRue*, however, only "relied upon the Twenty-first Amendment to 'strengthen' the State's authority to regulate live entertainment at establishments licensed to dispense liquor, at least when the performances 'partake more of gross sexuality than of communication.'" *Craig v. Boren*, 429 U.S. at 207 (quoting *LaRue*, 409 U.S. at 118); *see Doran v. Salem*

Inn, Inc., 422 U.S. 922, 932 (1975) (observing that "the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression"). The state regulations upheld in *LaRue* and subsequent cases thus were exercises of core Twenty-first Amendment power to regulate the conditions for alcohol sales on licensed premises and only indirectly regulated marginally "expressive" conduct. Indeed, the "critical fact" to the Court in *LaRue* was that the State "has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink." *LaRue*, 409 U.S. at 118; *see id.* at 119-20 (Stewart, J., concurring). *LaRue* and its progeny thus stand "not for the proposition that the twenty-first amendment overrides the first but for the more modest notion that twenty-first amendment power over alcohol consumption is broad enough to embrace state power to zone strong sexual stimuli away from places where liquor is served." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 6-24, at 478 n.15 (2d ed. 1988); *accord Michigan Beer*, 142 Mich. App. at 308-9, 370 N.W.2d at 335.

The FAAA is federal—not state—regulation of alcohol. For that reason alone, *LaRue* and Petitioner's Twenty-first Amendment argument are inapposite. Moreover, Section 205(e)(2) does not regulate marginally expressive conduct as in *LaRue*, but rather is an outright ban on commercial speech. The Government's claim to an "added presumption" of constitutional validity based on the Twenty-first Amendment fails to follow from the holding of *LaRue*, much less satisfy this Court's demanding standards for prohibiting commercial speech.

CONCLUSION

Section 205(e)(2) of the FAAA specifically targets non-misleading commercial speech and categorically prohibits inclusion of truthful information in the labeling of malt beverages. Despite the Government's unsupportable claims to the contrary, this restriction must be found by a reviewing court to comply with the standards established in *Central Hudson* before it can be upheld, and neither the nature of the product underlying that speech nor the Twenty-first Amendment infuses that restriction with any additional presumption of constitutional validity.

Respectfully submitted,

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